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CHARLES ELMORE CROPLEY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 679

SAN JUAN TRADING CO., INC.,
Petitioner,

vs.

MANUEL V. DOMENECH, TREASURER OF PUERTO RICO.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

L. E. DUBON,
Counsel for the Petitioner.

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vs.

MANUEL V. DOMENECH, TREASURER OF PUERTO RICO.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, San Juan Trading Co., Inc., a corporation organized and existing under and by virtue of the laws of Puerto Rico, prays a writ of certiorari to review the judgment of the Circuit Court of Appeals for the First Circuit, entered in this cause on October 16, 1940, in case numbered and entitled on its docket "No. 3567, October Term, 1939, San Juan Trading Co., Inc., Plaintiff-Appellant *v.* Rafael Sancho Bonet, Treasurer of Puerto Rico, now substituted by Manuel V. Domenech, Treasurer of Puerto Rico, Defendant-

Appellee," affirming that part of the judgment rendered on October 23, 1939, by the United States District Court for Puerto Rico, limiting to the sum of $17,600.00, the amount of the refund granted to the petitioner of the excise taxes paid under protest to the respondent, as Treasurer of Puerto Rico.

Summary Statement.

This action was brought to recover from the Treasurer of Puerto Rico, the sum of $26,400.00, paid under protest and collected as excise taxes due and levied upon 88,000 gross of 144 boxes each of friction safety uncolored square stick matches, packed in boxes with wooden outers or shucks, containing not less than 25 but not more than 50 sticks per box, which had been brought by the petitioner into Puerto Rico to be sold, transported, transferred, used or consumed therein, the said friction safety matches having been originally produced or manufactured in the Kingdom of Sweden and imported into the United States after August 5, 1935 (R. 2).

This tax was levied and collected under the provisions of Subdivision 7 of Section 16 of Act No. 85, approved by the Legislature of Puerto Rico, August 20, 1925, commonly known as the "Internal Revenue Law of Puerto Rico" (Laws of 1925, p. 585), as amended by Act No. 146, approved May 9, 1938 (Laws of 1938, p. 325), which statute is set out in the Appendix.

The validity of this tax and the authority of the respondent to levy and collect the same were challenged on the grounds that the statute in question:

(a) Deprived the petitioner of its life, liberty and property without due process of law, contrary to the provisions of the Fifth Amendment to the Constitution and paragraph 1 of Section 2 of the Organic Act of Puerto Rico, approved March 2, 1917, c. 145, 39 Stat. 951, 48 U. S. C. A. 737;

(b) Denied the petitioner the equal protection of the laws, contrary to the provisions of the Fourteenth Amendment to the Constitution and paragraph 1 of Section 2 of the same Organic Act of Puerto Rico;

(c) Violated the provisions contained in paragraph 22 of Section 2 of the same Organic Act of Puerto Rico to the effect that the rule of taxation in Puerto Rico, shall be uniform;

(d) Violated the provisions contained in paragraph 2 of Section 3 of the same Organic Act of Puerto Rico, as amended, by the Act of March 4, 1927, c. 503, Sec. 1, 44 Stat. 1418, 48 U. S. C. A. 741a; and,

(e) Contravened and violated the provisions of Article VI of the Reciprocal Commercial Trade Agreement entered into between the United States and the Kingdom of Sweden, signed May 25, 1935, 49 Stat. (Part 2) 3755.

Opinion of the District Court.

The District Court in its opinion (R. 18) held:

1. That there is no rational basis upon which to base a classification for taxation purposes between ROUND stick and SQUARE stick friction safety matches;

2. That there is no rational basis upon which to sustain a valid classification between SQUARE stick matches packed in boxes with wooden outers or shucks containing not less than 25 but not more than 50 sticks per box and the same SQUARE stick matches packed in boxes with wooden outers or shucks containing less than 25 or more than 50 sticks per box;

3. That ROUND stick and SQUARE stick friction safety matches are SIMILAR articles within the provisions of paragraph 2 of Section 3 of the Organic Act of Puerto Rico, as amended;

4. That ROUND stick and SQUARE stick friction safety matches are LIKE articles within the purviews of the Reciprocal Commercial Trade Agreement entered into between the United States and the Kingdom of Sweden, signed May 25, 1935; and

5. That the respondent was only entitled to levy and collect the same excise tax on SQUARE stick friction safety matches as is levied on ROUND stick friction safety matches under the challenged statute.

Appeal and Cross-Appeal.

The judgment of the District Court (R. 35) limited the refund to be made to the petitioner to the sum of $17,600.00, thus allowing only the return of 20 cents per gross on each of the 88,000 gross of boxes of matches above referred to. From that part of the said judgment denying the refund of the additional $8,800.00 claimed, the petitioner was allowed an appeal to the United States Circuit Court of Appeals for the First Circuit, the respondent having also taken an appeal from the judgment in its entirety (R. 35, 37).

Opinion of the Circuit Court of Appeals.

The Circuit Court of Appeals in its opinion (R. 47), which was rendered by a divided court, affirmed the judgment of the District Court, and thus the refund allowed to the petitioner remained limited to 20 cents per gross instead of the 30 cents per gross collected by the respondent and paid him under protest.

Petitioner's Position.

The petitioner contends:

1. That ROUND and SQUARE uncolored stick matches, are like or similar articles.

2. That the excise tax in question in discriminatory and void, because;

(a) It subjects SQUARE uncolored stick matches packed in boxes with wooden outers or shucks containing not less than 25 but not more than 50 sticks per box, to an assessment 20 cents higher than that levied on ROUND uncolored stick matches, similarly packed; and

(b) It subjects SQUARE stick matches packed in boxes with wooden outers or shucks containing not less than 25 but not more than 50 sticks per box, to an assessment of 30 cents per gross of 144 boxes, while NO TAX WHATSOEVER is levied on the *identical* SQUARE stick matches, when packed in boxes with wooden outers or shucks containing less than 25 or more than 50 sticks per box.

3. That therefore the entire tax on all uncolored stick matches should be stricken off the taxing statute and the petitioner allowed the refund of the full amount of the tax paid.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code of the United States, as amended by the Act of February 13, 1925, c. 229, 43 Stat. 938, 28 U. S. C. A. 347(a). The judgment of the United States Circuit Court of Appeals for the First Circuit, was entered October 16, 1940 (R. 62).

Questions Presented.

Conceding the invalidity of the excise tax in question, as found both by the District Court and the Circuit Court of Appeals, we submit that this petition presents three questions:

First. Whether the invalid or objectionable portions of the statute involved are separable, divisible and independent from the rest thereof.

Second. Whether after striking the invalid or objectionable portions of the statute involved, the remaining part is self-sustaining and enforceable without regard to that portion of the statute which has been cast aside.

Third. Can the courts, in construing a taxing statute, validly adopt a construction equalizing the tax burden, to avoid discriminatory distinctions, without encroaching on legislative functions.

Reasons Relied Upon for the Allowance of the Writ.

This case involves an important question with regard to the construction to be given to a taxing statute which is valid in part, but void as to other portions, which are separable and divisible.

The statute involved in this case levied different excises upon several distinct classes of matches, including uncolored stick matches. The tax levied upon each different class is separable from that levied upon the other several classes. The invalidity of the tax upon uncolored stick matches, in no way affects or impairs the validity of the tax levied upon the other classes of matches because wholly separable and independent of each other.

It also involves the important question with regard to the construction that may be given to taxing statutes discriminating against a particular person included within a certain class, by equalizing the burden upon all persons belonging to the same class.

Both the District Court and the Circuit Court of Appeals found that the statute in question subjected the SQUARE stick matches of the petitioner to a discriminatory assessment of 20 cents over that levied on ROUND stick matches similarly packed, and held that this was a void discrimination, but that as the petitioner was only entitled to be taxed at no higher rate than are those in like circumstances, limited

its action to remove the illegal or discriminatory excess, thus resorting to that construction as would impose a uniform tax both upon ROUND and SQUARE uncolored stick matches packed in boxes with wooden outers or shucks containing not less than 25 but not more than 50 sticks per box. In reaching this conclusion both courts ignored the discrimination in favor of SQUARE uncolored stick matches packed in boxes with wooden outers or shucks containing less than 25 or more than 50 sticks per box which were left WITHOUT ANY TAX BURDEN WHATSOEVER, and if the construction aforesaid was given to equalize the tax burden upon all persons belonging to the same class, all the stick matches should have been declared free of any tax whatsoever because otherwise tax-exempt articles by the statute, would be subjected to a tax assessment.

We submit that either court could not validity adopt a construction burdening the petitioner with any tax whatsoever without encroaching on legislative functions. We believe the question here presented has never been clearly settled by this Court, and that it should be settled.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued under the Seal of this Honorable Court directed to the United States Circuit Court of Appeals for the First Circuit, commanding that Court to certify and send to this Court for review and determination on a day certain to be named therein, a full and complete transcript of the record and proceedings in case numbered and entitled on its docket "No. 3567, October Term, 1939, San Juan Trading Co. Inc., Plaintiff-Appellant *v.* Rafael Sancho Bonet, Treasurer of Puerto Rico, now substituted by Manuel V. Domenech, Treasurer of Puerto Rico, Defendant-Appellee", and that the judgment of the said United States Circuit Court of Appeals for the First Circuit in the said case may be revised by this Honorable Court and

that your petitioner may have such other and further relief as to this Honorable Court may seem just, and your petitioner will ever pray.

L. E. DUBON,
Attorney for the Petitioner.

I hereby certify that I have examined the foregoing petition; that in my opinion it is well founded and entitled to the favorable consideration of this Court and that it is not filed for the purpose of delay.

San Juan, Puerto Rico.

L. E. DUBON,
Attorney.